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Protected Sick Leave & Child-Related Activities FREQUENTLY ASKED QUESTIONS (FAQs)

SB579 amended California Labor Code Sections 230.8 (Child-Related Activities) and 233 (Kin Care). The changes impact the County's practices regarding protected leave due to expanded protections, uses and definitions of covered family members.

Because the definition of "family member" was not uniform between Kin Care leave protections and the Paid Sick Leave Law (Healthy Workplaces, Healthy Families Act of 2014, AB 1522, LC Sections 245-249), SB 579 reconciled this definition between the two laws; however, it also applied the protections of Kin Care leave beyond caring for family members to protect ANY sick leave taken for reasons provided under the Paid Sick Leave Law, as well as expanded the reasons for sick leave use and the reasons an employee may take protected time off for child-related activities.

DEFINITIONS

COVERED: Protected Sick Leave - employees who receive Paid Sick Leave or Paid Time Off (PTO) are eligible for protected use of Paid Sick Leave or PTO to care for self or family members illness, injury or preventative care.

All regular full-time employees are eligible for protected time off to gain relief as a victim of domestic violence for reasons that do not allow for use of Paid Sick Leave.

All employees are eligible for protected time off for child-related activities.

COVERED FAMILY MEMBERS: Parent (biological, adoptive, foster, step or legal guardian), child (biological, adoptive, foster, step, legal ward, child of domestic partner or a child in loco parentis of the employee; not required to be under 18 years of age), spouse, registered domestic partner, sibling, grandparents and grandchildren. (This definition is broader than that included in County MOUs; the law supersedes and governs who is eligible).

PAID TIME OFF (PTO): A bank of leave time granted to employees who elect the Modified Benefit Option in lieu of other leave and is eligible for use in the same manner as sick leave, vacation and holiday time.

PROTECTED: Departments cannot deny the use of this time/time off nor should it be included in excessive absenteeism calculations, referenced in WPEs, or be used to or threaten to support discipline or any other adverse action.

USES ELIGIBLE FOR PROTECTION: Sick leave or other eligible leave used for the purposes of the employee's own illness/injury or a family member's illness/injury, or for time off used to gain relief as a victim of domestic violence, sexual assault or stalking; eligible leave/time off for child-related activities and other matters relating to domestic violence, sexual assault or stalking.

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PROTECTED LEAVE & RELIEF FOR DOMESTIC VIOLENCE, SEXUAL ASSAULT AND STALKING (Kin Care & the Paid Sick Leave Law)

1. What use is protected?

Illness/Injury (Labor Code 233): Each Calendar Year, up to ½ of the employee's annual Paid Sick Leave accruals or PTO is protected when used for the employee's own illness, injury or preventative care, or for a covered family member's illness, injury or preventative care.

Domestic Violence (Labor Code 230.1): Paid Sick Leave, PTO or other appropriate time off to gain relief as a victim of domestic violence, sexual assault or stalking:

2. Does the definition of family for which an employee has protected sick leave include any requirement that the family member reside with the employee?

No. The law does not require the family member to reside with the employee. Use of sick leave is protected to care for a child, parent, spouse, domestic partner, grandparents, grandchildren, or siblings regardless of where the family members reside.

3. If an employee has exhausted sick leave and must use other types of leave to care for a family member or to gain relief as a victim of domestic violence, sexual assault or stalking, does the new law protect the use of other types of leave?

Yes. Sick leave is defined in the Labor Code as any compensated leave that is provided to an employee as a benefit of employment for use by the employee during an absence from work for eligible reasons. As the MOU permits use of other types of leave when sick leave is exhausted, other paid leave types may also be protected if used for eligible purposes.

4. If an employee records leave without pay to take time off for eligible reasons, are those hours protected?

It depends. If the leave is used for the employee's own illness or injury, including care related to domestic violence, sexual assault or stalking, or to care for a covered family member, then sick time without pay/time off is not protected under LC 233. This time may be protected under another law such as FMLA, CFRA, PDL, etc. Please consult with your HRO on determining whether or not such leave is eligible for protection under another law.

Unpaid leave/time off used to gain relief as a victim of domestic violence, sexual assault or stalking, for eligible reasons other than medical treatment, such as an alarm installation, a court ordered appearance, or to obtain a temporary restraining order, is not an appropriate use for sick leave; therefore, an employee may use other leave or leave without pay, and this time would be protected.

5. Should I continue to submit a RESSL on behalf of employees on extended leave?

Yes. A RESSL is required for employees on extended leave; however, you should not ask the employee to provide a doctor's note if he/she has not exhausted half of their accrued sick leave for the year.

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6. Will FMLA be administered in the same way?

Yes. FMLA will be administered in the same way.

7. Can I deny an employee's use of protected leave due to business need?

No. Employees are entitled to utilize paid sick leave or to take time off for the reasons outlined and up to one-half (1/2) of their annual accrual of sick leave is protected. Employees cannot suffer discrimination for requesting leave or for use of leave.

8. How do the additional protections afforded to employees affect employees currently on a Leave Restriction Plan?

Current sick leave restriction plans should be reviewed to ensure any protected leave used after January 1, 2016 was not included in the sick leave analysis. Please consult your HRO before taking any action.

9. How do we analyze leave use?

An analysis of leave usage should carefully exclude any protected leave or protected unpaid leave. Additional considerations must include up to ½ of the employee's annual sick leave or PTO accrual as it is now protected.

10. Can I reference use of protected leave in a Work Performance Evaluation (WPE)?

No. Do not reference protected leave (paid or unpaid) in a WPE.

11. Does the use of protected leave affect eligibility for overtime?

Yes, if leave time is considered hours worked for the purposes of calculating overtime. Consult your HRO and the applicable MOU.

12. Can a supervisor ask for a doctor's note when an employee uses protected sick leave?

Generally no. Requesting a doctor's note for protected time may be considered discriminatory or retaliatory. Contact your Human Resources Officer to discuss case specific questions related to requesting doctor's notes.

13. The MOU states that Clerical staff can use all of their sick leave to care for a family member. How much of this leave is protected?

Up to ½ of the employee's annual accruals is protected for covered family members. The language in the MOU provides for unlimited use for "immediate family" residing with the employee – we can still enforce this definition, but only for the amount over and above ½ of the employee's annual sick leave accruals.

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SCENARIO: if an employee in the Clerical Unit accrues 88 hours of sick leave annually and uses 24 hours of paid sick leave for a personal illness and then uses 40 hours of paid sick leave to care for a sick child, the use of 24 hours of paid sick leave for the personal illness and the first 20 hours of paid sick leave for care of the child is protected by LC 233.

14. LC 233 protects ½ of an employee's annual sick leave accrual or PTO for illness/injury for self or a family member. The MOU states that an employee can use half of his/her annual sick leave accrual to care for a sick or injured "immediate" family member, while the regulations now protect the same amount for self or care for a family member. How much leave is protected?

LC 233 has been amended to protect ½ of an employee's annual sick leave accruals or PTO for self or covered family members, this is the standard that governs, so this is what is protected. MOU language allowing employees to use up to ½ of annual sick leave accruals to care for "immediate family" was intended to incorporate LC 233 requirements into the MOU. The MOU provision precedes legal changes and is not intended to provide a greater protection than what the law provides.

15. For employees with separate leave banks (e.g., sick, vacation, holiday, not PTO), if an employee has exhausted all sick leave, must the supervisor allow the use of vacation or other leave in lieu of sick leave?

If the employee has not used leave equivalent to half of any sick leave that could be accrued in one year, then the supervisor should allow the use of other types of appropriate leave in lieu of sick leave.

If the employee has used leave equivalent to half of sick leave accrued in a year, then the supervisor can deny the use of other leave and the employee will code unpaid time.

16. For what reasons can an employee who is the victim of domestic violence, sexual assault or stalking use sick leave?

An Employee who is the victim of domestic violence, sexual assault or stalking can use sick leave for any of the following:

- To obtain medical attention for injuries caused by domestic violence, sexual assault, or stalking; OR
- To obtain services from a domestic violence shelter, program, or rape crisis center as a result of domestic violence, sexual assault, or stalking; OR
- To obtain psychological counseling related to an experience of domestic violence, sexual assault, or stalking; OR
- To participate in safety planning and take other actions to increase safety from future domestic violence, sexual assault, or stalking, including temporary or permanent relocation.

17. Can an employee who is a victim of domestic violence, sexual assault or stalking use sick leave to testify at a court hearing?

No. Time off to appear in court or to obtain a TRO or restraining order does not justify the use of sick leave. Other leave types or time off without pay should be approved, and is protected.

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18. Can written proof be required from employees who are victims of domestic violence, sexual assault or stalking?

In some circumstances, yes. As a condition of taking time off for this purpose, an employee shall give reasonable advance notice of their intention to take time off, unless reasonable advance notice is not feasible. When an unscheduled absence occurs, the employee may be asked to provide proof of the reasons for the absence (i.e. a police report, court order protecting/separating employee who was a victim from the perpetrator and/or documentation from a licensed medical professional or DV counselor as provided for under the law).

19. What type of proof is sufficient to justify an unscheduled absence due to domestic violence, sexual assault or stalking?

Some examples of sufficient proof are as follows:

- a. A police report indicating that the employee was a victim of domestic violence, sexual assault, or stalking.
- b. A court order protecting or separating the employee from the perpetrator of an act of domestic violence, sexual assault, or stalking, or other evidence from the court or prosecuting attorney that the employee has appeared in court.

Documentation from a licensed medical professional, domestic violence counselor, as defined in Section 1037.1 of the Evidence Code, a sexual assault counselor, as defined in Section 1035.2 of the Evidence Code, licensed health care provider, or counselor that the employee was undergoing treatment for physical or mental injuries or abuse resulting in victimization from an act of domestic violence, sexual assault, or stalking.

SCENARIOS

1. An employee used their sick leave balance (four (4) hours) on January 11, 2016 and called in sick on February 15 through February 19, 2016. Upon the employee's request, the department approved the use of forty (40) hours of vacation leave in lieu of sick leave for the absence.

Question: Can the Department request proof of illness?

Answer: As long as the leave is not protected, the supervisor may request a doctor's note for any absences due to illness after February 19, 2016 (after ½ of annual sick leave accrual is used – 44 hours).

The department must also exclude all leave accruals used due to illness on or before February 19, 2016 from excessive sick leave analysis or to support any adverse employment action against the employee (including documenting in the WPE).

2. An employee calls in sick on February 15 through February 19, 2016 and has used the last four (4) hours of sick leave accruals prior to this. The employee has no other leave accruals available and records forty (40) hours of sick without pay (WOPSCK).

Question: Can the Department request proof of illness or use this absence in excessive sick leave analysis?

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Answer: Yes, as long as the leave is not protected, (e.g., LC 233, FMLA, CFRA, PDL, etc.) the department can request proof and consider this leave time in a leave analysis. Sick leave without pay is not protected under LC 233 if used for care of self or family member for illness/injury, including preventative care.

3. An employee who works a Monday through Friday, 8 a.m. to 5 p.m. schedule and has used 16 hours of sick leave during the calendar year forgets to call in sick. His supervisor eventually reaches him and the employee explains that he is sick and forgot to call in.

Question: Can the supervisor require proof of illness and/or discipline the employee?

Answer: In this case, the employee has not used $\frac{1}{2}$ of his annual sick leave accruals, so the supervisor may not request proof of illness; however, the employee is subject to corrective action for failing to provide appropriate notice of sickness. Consult with your HRO to review MOU and departmental requirements.

4. An employee has called in sick intermittently during the past few months due to a chronic condition. After using 20 hours of sick leave accruals, the employee contacted The Standard, the County's third party administrator for Leaves, to apply for protected leave under the Family Medical Leave Act and the California Family Rights Act.

Question: Can the Department request proof of illness from this employee for any future absences?

Answer: Although the employee has not used the equivalent of $\frac{1}{2}$ of his/her annual sick leave accruals, it is acceptable that The Standard request a physician's certification to process the application for FMLA/CFRA. However, it is still not permissible for the Department to request proof of illness for protected time.

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CHILD RELATED ACTIVITIES

1. What is a protected child-related activity?

Time off, with reasonable notice to the employer of the planned absence for emergencies, to find, enroll or re-enroll a child in school or with a licensed childcare provider, for requests to pick up a child for behavior/discipline issues or due to natural disasters, or to participate in activities of the school or licensed childcare provider.

2. What is considered a “child care provider or school emergency?”

A “child care provider or school emergency” means that an employee’s child cannot remain in a school or with a licensed child care provider due to one of the following:

- a. The school or child care provider has requested that the child be picked up, or has an attendance policy, excluding planned holidays, that prohibits the child from attending or requires the child to be picked up from the school or child care provider.
- b. Behavioral or discipline problems.
- c. Closure or unexpected unavailability of the school or child care provider, excluding planned holidays.
- d. A natural disaster, including, but not limited to fire, earthquake, or flood.

3. How much time is protected?

Forty (40) hours per year, up to eight (8) hours per month.

4. What kind of time can an employee use?

Employees shall utilize paid leave time for any absences related to child-related activities. Time off without pay may be approved if appropriate leave balances are not available. Sick leave is not appropriate for this purpose.

5. How much notice must an employee provide to attend to a child related activity?

An employee must provide “reasonable notice” to the employer. Once the employee is aware of the need for leave, he/she should notify his/her supervisor or as soon as practicable.

6. Who tracks use of this time?

The immediate supervisor should track this time.

7. Can I request proof for child-related activities?

Yes, you can request proof.

8. I have two employees at my worksite who share a child, are they both entitled to protected time off for the same child-related activity?

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No, if both parents are employed by the County at the same worksite, only the parent who first gives notice for the same event is eligible for protected time. It is at the discretion of the supervisor to allow both employees the same amount of time off, but only one employee's time is protected.

9. An employee calls in stating that she will not be able to report to work because her husband has a final exam that day and she does not have anyone to watch her children. Is that covered under child related activities?

No. The husband isn't a licensed child care provider and the employee would not have protection for this emergency. A babysitter or Nanny would not be covered for the same reason.

10. An employee calls in stating that her licensed childcare provider is closed due to a personal emergency and she does not have anyone to watch her children. Is this a child related activity entitling the employee to protected time off?

Yes. If the childcare provider is licensed, and the employee only recently learned of the provider's unavailability, the time off would be protected.